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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1996

C & D CHARTER POWER SYSTEMS, INC.,
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE ANALYSIS THAT SHOULD BE USED WHEN CONFRONTED WITH A POTENTIAL MIXED MOTIVE CASE.

A. The Circuit Courts Have Inconsistently applied the Wright Line Test, an analysis based on the general analysis used by this Court when examining causality in cases for which there is an allegation of unlawful employer conduct in a civil rights setting.

B. The Circuit Courts have inconsistently applied different Analyses when dealing with a mixed motive decision.

C. The Board did not enter into the Required Dual Motive, as Set Forth in Wright Line, as applied to Williamson's Conduct and C & D's Suspension of Williamson.

II. THE CIVIL RIGHTS RESTORATION ACT OF 1991 ADDRESSES AN ANALOGOUS STANDARD TO BE APPLIED UNDER THE NATIONAL LABOR RELATIONS ACT.

A. The 1991 Amendments to Title VII of the Civil Rights Act of 1964 evidence a clear congressional intent to adjust the scope and reach of federal employment laws prohibiting discrimination.

B. This Court Should be Guided by the Civil Rights Act of 1991 when confronted with a Challenged Employment Decision that was Motivated by both Lawful and Discriminatory Reasons, under the NLRA.

C. The Guidelines as Set Forth in the Civil Rights Act of 1991 Should Have Been Applied to Williamson's Post-Suspension Misconduct as a Means in Limiting the Available Remedies.

PARTIES TO THE PROCEEDING

Petitioners:

C & D Charter Power Systems, Inc.

Respondents:

National Labor Relations Board.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit concerning the Petition for Review and Cross-Application for Enforcement of an Order by the National Labor Relations Board as set forth in Appendix C.

In so doing, the U.S. Circuit Court for the District of Columbia issued a judgment denying the Petition for Review and affirming the Cross-Application for Enforcement.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit denying the Petition for Review was entered in the September Term, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

In addition, this Court is authorized, pursuant to 28 U.S.C. § 1651 (a) to issue all writs, necessary or appropriate in all of its jurisdictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3):

Section 8 (a) It shall be unfair labor practice for an employer---

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (pertaining to representation elections under the NLRA); . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

STATEMENT OF THE CASE

1. Nature of the Controversy

This case involves the alleged violation by C & D Charter Systems, Inc.(hereinafter referred to as the Petitioner

or C & D), of Section 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the "Act."). (29 U.S.C. 158 (a)(1) and (3)). Since the early 1990's, the petitioner has been involved in litigation regarding the alleged anti-union animus activities and the suspension and acceptance of the resignation of Robert Williamson, from C & D employment following his serial acts of insubordination and disruptive conduct both prior to and subsequent to his suspension. During the past five years, the litigation has advanced and was eventually heard before the National Labor Relations Board. The NLRB issued a Decision and Order in this case whereby it found, inter alia, that the Petitioner had, in a single speech, violated Section 8(a)(1) and (3) of the Act by issuing a single verbal warning, suspending and accepting the resignation of Robert Williamson and by failing to offer to reinstate Williamson because of his protected union activities. (A of the Decision and Order is set forth as Appendix B). A petition was filed by C & D with the United States Court of Appeals for the District of Columbia Circuit requesting a review of the order of the NLRB.

The Court of Appeals Ordered and Adjudged that the Petitioner's Petition for Review was denied and the Board's Cross-Application for Enforcement was granted. (A copy of which is set forth in Appendix C). The Court found that there existed substantial evidence to support the Board's findings with respect to the warning, suspension and dismissal of Williamson. In briefing the issue to the circuit court, the Board specifically referenced testimony not affirmatively analyzed by the Board or the Administrative Law Judge.

The basis controversy is whether the United States Court Of Appeals for the District of Columbia Circuit through its Order denying the C & D's Petition for Review and granting the Board's cross-application for enforcement based on the Board's factual findings, has incorrectly applied federal law, and as such, this issue should be resolved by this Court.

2. Summary of Facts

The Petitioner, C & D Charter Systems, Inc., is a Delaware corporation which at all times relevant hereto had a plant and place of business in Huguenot, New York. The Petitioner is engaged, inter alia, in the manufacturing of industrial batteries for vehicles, and the non-retail sale of batteries. During all material times, the Petitioner employed approximately one hundred and fifty seven production and maintenance employees on a three shift schedule at the Huguenot facility.

In the fall of 1990, the Union instituted an organizing effort at the Petitioner's Huguenot facility. Later, in early December of 1990, C & D began to conduct a series of small group employee meetings for the primary purpose of discussing the plant conditions and operations in the election setting. These meetings were conducted by various members of Petitioner's managerial personnel. Al Weber was, at all relevant times, Petitioner's C.E.O. and President. Arthur Imdorf held the position as the Petitioner's General Plant Manager. The position of Vice President of Corporate Service and Corporate Counsel was held by Stephen Weglarz. The Manager of Human Relations was Harry Fronjian. The plant supervisor was Mr. Balmos.

On the afternoon of December 21, 1991, the Petitioner held a plant-wide meeting at which the President/CEO of the company, Al Weber, spoke with its employees pursuant to Petitioner's rights under 8(c) of the Act. This was about 40 days prior to the National Labor Relations Board conducted election which was held during the last day of January 1991. The purpose of these meetings, which were conducted in small groups and attended by all Huguenot employees, was to discuss the plant's history, performance, and prognosis and the upcoming union election and the delicate economic situation and absence of profitability at C & D's Huguenot

plant.

The record establishes that during this speech, Mr. Weber discussed the history and status of the Huguenot plant and in passing compared that facility to a similar C & D work site in Perth, Canada. In doing so, he also presented truthful general information pertaining to the Petitioner's fragile, but improving financial position. In the course of this meeting, the Petitioner attempted to improve the morale of the plant by showing an inspirational film featuring Lou Holtz and the Notre Dame football team. Mr. Weber's speech consisted of lawful references to a review of wages, benefits and increases for the 1990 year, and a discussion of a possible consolidation of plant operations and the ongoing intention to invest money to revamp the oxide mill serving the facility. Mr. Weber's speech also made references to a plant-wide commitment to work together as a team and he also expressed the sentiment that "... certain recent events have caused me to question this faith." Mr. Weber expressed his view that there existed some dissatisfaction expressed in any desire to be represented by a Union. Throughout Weber's entire speech, he made lawful and careful review, inter alia, of the economic posture of the company, the obligations of the parties under the National Labor Relations Act and, in conclusion, he stressed the importance of the employee's vote in this upcoming election.

Routinely during most meetings, the plant employees would ask questions about the company and the upcoming Board elections. Robert Williamson attended these meetings. Williamson was employed by the Petitioner primarily as a utility worker in the assembly department from June 24, 1985 until his resignation on January 25, 1991.

During a December meeting, attended by Williamson, the employees, including Williamson, often interrupted each other by asking different questions at the same time. In an

attempt to answer and maintain a semblance of order, Mr. Imdorf, the speaker, asked the employees if they would ask only one question at a time so by he could properly respond to that particular question. While Mr. Imdorf was responding to a question, he was interrupted by Williamson who shouted out another question. Mr. Imdorf stated that he would address Williamson's question as soon as he finished answering the pending question. After Mr. Imdorf answered the prior question, he immediately asked Williamson if he could please repeat his question. At this time, Williamson rudely and publicly exclaimed, "Nothing. You're worthless."

Immediately after Williamson made this comment, Mr. Imdorf asked "What did you say?" Williamson initially denied making this rude and defamatory comment, but later, he attempted to retract his statement. However, after this shocking and dis-respectful comment was made, Williamson achieved his desired effect, the meeting had lost its sense of decorum and interchange of views stopped. Subsequently, the meeting was quickly brought to a conclusion and all of the employees were asked to resume their job duties.

Soon after the meeting, Williamson returned to his work station, he was asked if he could go to the personnel department to have a meeting with Harry Fronjian, the new Human Relations Manager, and Bob Lane. Mr. Fronjian began the meeting by reminding Mr. Williamson that he had previously been counselled, without sanctions for using disrespectful language towards Mr. Imdorf. Mr. Fronjian was referring to a previous similar small group meeting, held on January 7, 1991, also conducted by Mr, Imdorf, wherein Mr. Williamson engaged in disruptive and disrespectful conduct, again directed at Mr. Imdorf.

Thus, Mr. Fronjian was referring to an incident that had occurred just two weeks earlier whereby Williamson engaged in disruptive and disrespectful conduct when he shouted a comment that was directed toward Mr. Imdorf

while he was trying to conduct a meeting. During this meeting, the employees were asked by Mr. Imdorf if they would refrain from asking questions until the close of his speech and then, at that time, he would answer all of their questions. Almost immediately, Williamson interrupted the meeting by shouting in a loud and disruptive manner "Yeah, he might lose his place [in the text of the speech]." Mr. Imdorf rejoined that he would not and went on to complete his speech. Following this initial incident, Williamson was called into the office of Mr. Frojian where they discussed the deprecatory and antagonistic remark Williamson directed at Mr. Imdorf. Mr. Frojian also advised Mr. Williamson that he probably would be attending other employees meeting in the future, and Mr. Frojian directed him to control his temper and inappropriate outbursts during these meeting because any verbal abuse in that setting would not be tolerated, pursuant to C & D's policy.

On the January 25, 1991 meeting in Mr. Frojian's office, Mr. Williamson conveniently asserted and dissembled that he did not mean to make the "you're worthless" comment during the meeting. Mr. Fronjian informed Mr. Williamson that because this was the second incident in such a short time span that he had caused a disruption and used disrespectful language during an employee meeting, C & D had no alternative but to suspend him while the company evaluated his actions. Initially, the suspension was to be indefinite until Mr. Fronjian, the new Human Relations manager and new labor counsel, Mr. Stephen Weglarz, evaluated Mr. Williamson's past employment history and the events of that particular incident.

As Mr. Fronjian began to tell Mr. Williamson that C & D would be in touch with him about his length of his suspension and asked that he punch out and go home, Mr. Williamson abruptly stood up and exclaimed in a loud voice, "You may as well fire me now because I quit." He then began to shout expletives at Mr. Fronjian and Mr. Lane,

saying "Fuck you and this fucking place," and stomped out of Fronjian's office, slamming Fronjian's door with such a jarring force that it had dislodged the ceiling tiles and showered the men with dust and ceiling particles. Mr. Williamson's voice was so loud that it was heard by other people in the executive suite/public area of the plant's offices. (It was subsequently noted that Mr. Williamson's intemperate conduct and outbursts have been at the root of at least one other disciplinary action against him, when he almost precipitated a physical altercation between himself and another employee by yelling at the employee in an abusive manner.)

After Mr. Williamson stormed out, Mr. Tice, a C & D supervisor, upon Mr. Lane's instructions, followed Mr. Williamson into the locker room in order to escort him out of the building and to effectuate his resignation. Mr. Tice told Mr. Williamson that C & D understood that he had tendered his resignation, and that the Company would report him to the unemployment office as a "voluntary quit." Williamson shouted, "[y]ou fucking people. It's --you guys are doing it." [At the time he testified, Mr. Tice was a federal corrections officer with no connections with the Petitioner.]

Immediately after this verbal exchange, Mr. Williamson's temper heightened further and he "...went berserk...", and began abusing the adjacent locker with sufficient force as to cave in their steel sides. Williamson also turned towards Mr. Tice and screamed, "I'm going to kill you and anyone else who walks in this door." At some point in time, Williamson tendered his plant identification in a hostile manner.

Mr. Tice asked Mr. Williamson to please calm down, but when Williamson continued to rant and rave, Mr. Tice and a custodian present in the locker room, quickly exited "...in fear of severe bodily harm..." and in order to avoid an inappropriate confrontation. Mr. Tice immediately departed to

the cafeteria where the management staff was positioned in order to inform them of the latest happenings. After making a decision to call the police because of Mr. Williamson's actions, Mr. Tice returned to the area of the locker room and waited for Williamson to come out so that he could be immediately escorted from the plant. As Williamson exited the plant, he implored Mr. Tice not to inform any one else of his conduct or the damage that he had done to the lockers. However, Mr. Tice told him that it was too late and that other individuals in the Company were aware of his outrageous and extreme actions. Williamson then proceeded to shake Mr. Tice' s hand while expressing his regrets for this unexcusable actions. This was, at least, the third time that he conveniently sought to minimize and excuse his own misconduct after the fact.

On January 29, 1991, Mr. Williamson drafted a letter to Mr. Imdorf questioning the length of his "suspension" from C & D . Mr. Imdorf responded to Williamson's inquiry by stating that he had, in fact, effectuated a resignation during the meeting with Mr. Fronjian and Mr. Lane and he was no longer deemed to be an employee of the Company.

The Petitioner had, and has maintained an express policy against the use of abusive, obscene or disruptive language within the plant's limit. The Company's penalty for such initial conduct is a written warning and a three-day suspension with progressive sanctions possible. Additionally, the Company also has express policies against threatening other employees and against purposely damaging, destroying, or abusing Company property. The penalty for these more serious violations of Company policy, even on the first occurrence, includes immediate discharge. Thus, Petitioner asserted, even assuming arguendo that Williamson did not tender his voluntary resignation, he committed at least three separate offenses subsequent to his meeting with Mr. Fronjian and Mr Lane, any of which warranted his immediate discharge.

3. Proceedings Below

A. Appeal to United States Court of Appeals for the District of Columbia, Nature of Action, and Basis for Jurisdiction.

On March 13, 1996, the Petitioner filed a Petition and a supporting Brief for Review of the Decision and Order entered August 25, 1995 by the National Labor Relations Board at Case No. 2-CA-24906 in the United States Court of Appeals for the District of Columbia Circuit. Jurisdiction was properly in the United States Court of Appeals for the District of Columbia Circuit pursuant to sections 10(e), (f) and (g) of the National Labor Relations Act. 29 U.S.C. §160 (e), (f) and (g) allowing for direct appeals of final orders of the National Labor Relations Board to, inter alia, the Circuit Court for the District of Columbia.

B. Relief sought

The relief requested of this Court, as well as the relief sought from the court below, is a review of the November 2, 1994 Order by the National Labor Relations Board and the underlying ALJ's order. In this Order, the NLRB had concluded that C & D by issuing a verbal warning, suspending and discharging Robert Williamson, and by failing to offer to reinstate him, for activities protected by the Act, violated Section 8(a)(1) and (3) of the Act.

The Petitioners sought a Petition for Review from the United States Court of Appeals for the District of Columbia Circuit of the aforementioned order of the National Labor Relations Board. The Court of Appeals ordered and adjudged that the Petition for Review was denied.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS AS TO THE ANALYSIS THAT SHOULD BE USED WHEN CONFRONTED WITH A POTENTIAL MIXED MOTIVE CASE.

The mechanical application of dealing with a mixed motive decision involves job bias cases where the challenged employment decision was motivated by both lawful and discriminatory reasons.

Section 7 of the Act (29 U.S.C. 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations." Section 8 (a)(1) of the Act (29 U.S.C. 158(a)(1)) makes it an unlawful labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7 of the Act. Section 8(a)(3) of the Act (29 U.S.C. 158 (a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to...tenure of employment or any term or condition of employment to...discourage membership in any labor organization."

Section 8(a)(3) and (1) of the Act is violated by an employer if an employee is discharged for engaging in protected concerted and union activity. NLRB v. Transportation Management Corp., 462 U.S. 393, 400-403 (1983) ; Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257, 263-264 (D.C. Cir. 1993); Southwire Co. v. NLRB, 820 F.2d 453, 459 (D.C. Cir. 1987). The question of an employer's motivation for a discharge of an employee is a question of fact and one for which is to be decided by the Board in the first instance. See Passaic Daily News v. NLRB, 763 F.2d 1543, 1551-1552 (D.C. Cir. 1984).

A. The Circuit Courts Have Inconsistently applied the Wright Line Test, an analysis based on the general analysis used by this Court when examining causality in cases for which there is an allegation of unlawful employer conduct in a civil rights setting.

In determining whether the conduct in question is unlawfully motivated, the Board will rely on circumstantial as well as direct evidence to infer discriminatory motivation on the part of an employer. It considers circumstantial evidence such as the following: a delay in the discharge after knowledge of the offense;[1] a departure from established procedures for discharge;[2] failure to warn the employee prior to the discharge;[3] failure to inform the employee of the reason for the discharge at the time of the discharge;[4] any position changes in explaining the reason for the discharge;[5]

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[1]Merchants Truck Line, Inc. v. NLRB, 557 F.2d 1011 (CA 5, 1978), enforcing 232 NLRB 676 (1977); Montgomery Ward & Co., 197 NLRB 519 (1972).

[2]Richmond Refining Co., 212 NLRB 16 (1974); D.H. Baldwin Co., 207 NLRB 25 (1973), enforcing 5085 F.2d 736 (CA 8, 1974).

[3]Great Atl. & Pac. Tea Co., 210 NLRB 593 (1974); Coble Dairy Prods. Coop., Inc., 205 NLRB 160 (1973); National Food Serv., 196 NLRB 295 (1972).

[4]Forest Park Ambulance Serv., 206 NLRB 550 (1973); Alamo Express, Inc., 200 NLRB 178 (1972), enforcing, 489 F.2d 1311 (CA 5, 1974).

[5]Coca-Cola Bottling Co., 232 NLRB 794 (1977); J.R. Townsend Lincoln-Mercury, 202 NLRB 71 (1973); Goodyear Tire & Rubber Co., 197 NLRB 666 (1972)

and the timing of the discharge in relation to other relevant facts.[6]

Once is it established that an employee's protected activity was a motivating factor in the employer's decision to take adverse action against the employee, the burden then shifts to the employer to sustain the affirmative defense that the adverse action would have taken place even in the absence of the protected conduct. NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983)(approving allocation of the burden of proof as set forth in Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)).

Pursuant to section 8(a)(3) of the NLRA, an employer commits an unfair labor practice by "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" 29 U.S.C. §158 (a)(3). It is only when animus represents a "substantial or motivating factor" in an employer's decision to discharge an employee, that the employer violates the NLRA sections 8(a)(1) and (3). Further, "to establish a violation of section 8(a)(3), the Board's General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" and that once this is established, "the burden ... shift(s) to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Adair Standish Corp., 912 F.2d 854, 861 (6th Cir. 1990)(citing Lawson Co. v. NLRB, 753 F.2d 471, 476 (6th Cir. 1985)).

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[6]Marx-Haas Clothing Co., 211 NLRB 350 (1974); Shivers Corp., 213 NLRB 102, (1974); D.M. Rotary Press Inc., 208 NLRB 366 (1974), enforced, 524 F.2d 1342 (CA 6, 1975).

Since only discriminatory conduct, motivated by union animus, violates section 8(a)(3), establishing the employer's unlawful motivation is a precondition to finding a violation of section 8(a)(3). An employer has the right to take disciplinary action for good cause related to the maintenance of order and efficiency in his plant. Section 10(C) recognizes this right by prohibiting Board orders of reinstatement and back pay orders where the employee was "suspended or discharged for cause."

The Board in its 1980 decision in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), enforced, 662 F.2d 899 (CA 1, 1981), cert. denied, 455 U.S. 989 (1982), attempted to eliminate this uncertainty among and between the appellate courts and the National Labor Relations Board regarding the appropriate analysis for examining causality in cases for which there is an allegation of unlawful and unfair conduct. In this particular case, the Board adopted an analysis based upon that used by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). See also, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). Under the Board's analysis in Wright Line, the General Counsel has the burden to initially establish a prima facie case with regards to showing that the protected conduct was a motivating factor in an employer's decision. Once the General Counsel has met this prima facie showing, the burden then shifts to the employer to demonstrate, as an affirmative defense, that the decision would have been the same even in the absence of the protected conduct.[7] It is this shifting of the burden from the employee to the employer

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[7]Wright Line, Inc., supra. See also, Herman Bros., Inc., 252 NLRB 848 (1980); United Parcel Serv., 252 NLRB 1015 (1980); Valley Cabinet & Mfg., Inc., 253 NLRB 98 (1980); Weather Tamer, Inc., 253 NLRB 293 (1980).

which distinguishes it somewhat from the Board's Mt. Healthy-Wright Line test from the "dominant motive" analysis applied by several of the circuit courts. Although the burden shifts, the shift does not undermine the established principle that the General Counsel must establish an unfair labor practice by a preponderance of the evidence and also carries the burden of persuasion. While positing that the two types of section 8(a)(3) cases, pretext and mixed motive, are analytically different, the Board in Wright Line has acknowledged the Mt. Healthy test was readily applicable to both.

Where a violation of section 8(a)(3) is charged, the question of whether the employer actually changed the terms, conditions or tenure of an employee's employment is rarely disputed. What is most often in contention is whether the employer's intended to encourage or discourage the employee's union membership. Further, an employer may still avoid section 8(a)(3) liability, despite a prima facie showing of discriminatory intent, by proving that the employer's motive underlying his action was not attended by "discriminatory consideration."[8]

The Board has consistently found Wright Line applicable in all section 8(a)(3) cases where the employer's motive was an issue. The appropriateness of Wright Line in pretext situations has received some special consideration.[9]

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[8]Continental Chem. Co., 232 NLRB 705, 96 LRRM 1327 (1977). See NLRB v. Collier, 553 F.2d 425, 95 LRRM 2615 (CA 5, 1977), denying enforcement to 223 NLRB 1492 (1979); Mosher Steel Co. v. NLRB, 568 F.2d 436 (CA 5, 1978), enforcing in part 226 NLRB 1163 (1977).

[9]E.G., Webb Furniture Enters., 272 NLRB 312 (1984).

More recently, this Court in St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782, 113 S.Ct. 2742, 421 L.Ed. 2d 407 (1993), affirmed the essential approach of Wright Line and indicated that the party claiming the illegal factor does not prevail merely by a showing a possible bad motive, such a juxtaposition is not sufficient to support a ALJ's or Board's determination. Correctly applied, once the employer has satisfied his burden of production by coming forward with a nondiscriminatory reason for its action, the employee no longer enjoys the benefit of any presumption. The employee still must establish that the employer intended the illegal action. In short, the burden of persuasion still resides with the General Counsel.

B. The Circuit Courts have Inconsistently applied different Analyses when dealing with a mixed motive decision.

The circuits have variously applied different rules of law when confronted with a mixed motive decision. Further, the circuit courts do not appear to agree upon the "quantum of animus" necessary to find a violation of section 8(a)(3).[10]

The First Circuit has required that the discriminatory motive be the primary, or controlling, factor promoting the

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[10]See, e.g., NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (CA 10, 1977)("partially motivated"); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570, (CA 4, 1977)(no discharge "except for"); NLRB v. Townhouse TV & Appliance Corp., 531 F.2d 826, 828, (CA 3, 1972)("substantial or motivating cause"); NLRB v. Fibers Int'l Corp., 439 F.2d 1311 (CA 1, 1971)("dominant motive").

employer's conduct.[11] In one case, the First Circuit noted that the Board must articulate, as well as, apply that the court's standard and "find affirmatively that the discharge would not have been effectuated but for the improper reason."[12]

In a similar instance, the Ninth Circuit has taken the position in requiring that the improper motive must be dominant and the "moving cause" of the employer's conduct.[13] The Ninth Circuit went on to state that the test in such instances is whether the business reason or the protected union activity is/was the predominant or moving cause behind the discharge.[14]

The Fourth Circuit has taken a different approach

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[11]NLRB v. South Shore Hospital, 571 F.2d 677 (CA 1, 1978); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (CA 1, 1978); NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880 (CA 5, 1978), denying enforcement in relevant part to 232 NLRB 621, 96 LRRM 1345 (1977); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (CA 1, 1977), enforcing per curiam 224 NLRB 1547 (1976); NLRB v. Circle Bindery, Inc., 536 F.2d 447 (CA 1, 1976).

[12]Coletti's Furniture, Inc. v. NLRB, supra.

[13]Stephenson v. NLRB, 614 F.2d 1210, (CA 9, 1980); Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467 (CA 9, 1978).

[14]NLRB v. West Coast Casket Co., 469 F.2d 8781, 874, (CA 9, 1972), quoting NLRB v. Ayer Lar Sanitarium, 436 F.2d 45 (CA 9, 1970); accord, NLRB v. Miller Redwood Co., 407 F.2d 1366 (CA 9, 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 725 (CA 9, 1966)

when confronted with the issue of whether the business reason or the protected union activity is the moving cause behind the employment discharge. The Fourth Circuit has refused to enforce the Board's finding of a section 8(a)(3) violation where, the court viewed the board's conclusion that the company's anti-union motivation was based on "mere suspension and conjecture."[15] Presently, the circuit courts appear not to agree as to extent that the discriminatory motive is to be applied.

C. The Board did not enter into the Required Dual Motive, as Set Forth in Wright Line, as applied to Williamson's Conduct and C & D's Suspension of Williamson.

As set forth in Wright Line, the Board attempted to resolve the uncertainty that existed among the appellate courts and the National Labor Relations Board as to the analysis to be implored when examining cases where there exists an allegation of an unlawful labor practice by an employer. In resolving this issue, the Board, in adopting an analysis based upon the one as set forth by this Court in Mt. Healthy City, established that the starting point with a mixed motive analysis rests with the General Counsel.

The General Counsel has the burden of proof in establishing a prima facie case with respect to showing that the employee's alleged protected conduct was a motivating factor in the employer's employment decision with regard to the employee. Once this burden is met by the General Counsel, the burden then shifts to the employer to demonstrate, as an affirmative defense, that the decision in

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[15] Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1339, 93 LRRM 2625 (CA 4, 1976).

regards to the employee's employment would have been the same even in the absence of the employee's protected conduct. Even though the burden shifts from the general Counsel to the employer, the General Counsel still must affirmatively establish an unfair labor practice under Section 8(a)(3).

In the case at hand, the Administrative Law Judge and the Board failed to consider or resolve the issue of a dual motive or the requisite analysis. The Board, in resolving the issues, never analyzed whether or not, or to what degree or extent, Williamson's misconduct and disruptive behavior was a motivating factor in C & D's decision. Additionally, if this burden was met by the General Counsel and had shifted to C & D to affirmatively show that the decision would have been the same even, in the absence of the alleged employer's action (acceptance of resignation or underlying suspension), this burden would have easily been met based on Williamson's serial record acts of insubordination and disruptive conduct prior to and subsequent to his suspension from employment with C & D, notwithstanding his voluntary resignation from employment.

The ALJ erred in failing to resolve the credibility dispute between Williamson and C & D, and simply generally credited Williamson testimony over C & D's. The ALJ in his decision, credited the testimony of Williamson in that he did not voluntarily resign from his position at C & D. The label for such predicated acts-suspension, then termination with or without resignation-does not address the basis factual or legal issue. The ALJ further found that as of the date of January 31, Williamson's indefinite suspension was converted into a discharge. The underlying credibility finding were unsubstantiated in the ALJ's decision and are completely unsupported by the record. The ALJ also arbitrarily found that C & D's reasons for refusing to reinstate Williamson (i.e. profanity and violence) were pretextual and that C & D did not sustain its burden. The ALJ made another grossly

arbitrary finding and arbitrarily credited Williamson testimony that Mr. Imdorf came from behind the podium and yelled at him for asking his question, despite the fact that no less than eight other individuals contradicted the testimony of Williamson. (No other witness than Williamson reported such behavior to Mr. Imdorf.) Again, the law and the record clearly contradicts such a finding and supports the conclusion that it was Williamson's own blatant insubordination which led to C & D's suspension.

Another example of an arbitrary creditability determination made by the ALJ as to Williamson's testimony, is the finding that C & D "has not shown by a preponderance of the evidence that the threat [to kill Tice] was made." (Appendix A-10). The ALJ credits Williamson's uncorroborated denial of this threat despite the existence of an overwhelming quantity of strong evidence to the contrary. The record reflects that Williamson angrily left Mr. Fronjian's office by slamming the door with excessive force and used profanity as he left. Other individuals in the area open to the public heard this vulgar language in the commotion caused by Williamson. After this outburst, Williamson proceeded to the general locker area whereby he proceed to beat on the lockers and told Mr. Tice, "I'm going to kill you and anybody else who walks in this door." At this particular time, Williamson was in such a rage that he had to be escorted off company property by the police. In the face of all this evidence and testimony, the ALJ nonetheless credited Williamson's denial that he made such a threat on Mr. Tice's life. This is another example of a finding by the ALJ for which is completely unsubstantiated by the record. Also, as of the date of the ALJ hearing, Mr. Tice was a federal corrections officer without any contacts involving the Petitioner.

Both the ALJ and the Board inappropriately minimized Williamson's initial course of willful misconduct and his course of post-suspension misconduct. Williamson's conduct

consisted of an extended, willful, disruptive course of conduct which should be viewed as dissipating any "concerted activity" component. As such, this case presents to this Court, the issue as to the proper analysis to be used when confronted with a mixed motive employment decision. This case will allow this court to intervene so that the proper analysis, under Wright Line can be applied to the case at hand, and industrial order attained.

II. THE CIVIL RIGHTS RESTORATION ACT OF 1991 ADDRESSES AN ANALOGOUS STANDARD TO BE APPLIED UNDER THE NATIONAL LABOR RELATIONS ACT.

This Court should hold that Title VII of the Civil Rights Act of 1964, as amended in 1991, supports the Petitioner's view of the issues in this appeal. The 1991 amendments to Title VII of the Civil Rights Act of 1964 have significantly changed mixed motive jurisprudence and appear to reflect a congressional response to this Courts rulings that narrowed the scope and available remedies under federal employment discrimination laws. Also, it is the latest policy direction from Congress concerning similar employment/workplace issues. The substantial changes and additions to the 1964 Civil Rights Act show an apparent congressional intent to expand the effectiveness of discrimination laws in the federal employment sector.

A. The 1991 Amendments to Title VII of the Civil Rights Act of 1964 evidence a clear congressional intent to adjust the scope and reach of federal employment laws prohibiting discrimination.

In 1991, Congress attempted to clarify the Mt. Healthy type of analysis when confronted with the issue of whether the business reason or discrimination was the moving factor

behind the employee's discharge of his/her employment through the Civil Rights Act of 1991. The congressional enactments sought to directly address protection of the discrimination laws and the remedial scope of the employee. The purpose of the CRA was to inter alia, adjust remedies for intentional discrimination and unlawful harassment in the workplace.

There existed, inter alia, much debate as to whether or not a mixed motive decision violated Title VII of the Civil Rights Act of 1964. The problem was addressed by the Supreme Court in Price Waterhouse v. Hopkins, 485 U.S. 933, 109 S.Ct. 1775 (1989). The issue the Court sought to resolve was "the respective burdens of proof" of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. Id at S.Ct. 1781. The prevailing plurality concluded that while a plaintiff did not have the burden of proving that, absent discrimination, the decision would have been otherwise, the employer could nonetheless avoid liability by proving that "even if it had not taken the unlawful motive into account, it would have come to the same decision regarding a particular person." Id at 1786. Such a showing was to be made "by a preponderance of the evidence" rather than the more demanding "clear and convincing evidence" test. Id at 1792.

The CRA of 1991 was promulgated in response in part to the aforementioned decision in which there existed some job bias cases that involved a challenged employment decision that was motivated by both lawful and discriminatory reasons. Section 107 of the CRA pertains to and adjusts the holding as set forth in Price Waterhouse v. Hopkins.

Under this section of the 1991 Act, an employment action violates Title VII if the discrimination is a motivating factor in that decision, regardless of whether lawful motives were also factored into the decision. However, if the

employer establishes that the same employment decision would have been made in the absence of discriminatory motivations, that showing will not alter the existence of a Title VII violation, but limits the available remedies. Title VII § 706(g)(2)(B), 42 U.S.C. §2000e-5(g)(2)(B), as amended by CRA of 1991, Sec. 107(b).

The court, then, is able to restrain the employer from future violations without placing the employee in a better position than he or she would or should have been in absence the employer's partially improper motive. Therefore, the issue involving whether or not an employer would have made the same decision in the absence of any discriminatory motive is principally relevant in the remedial phase of the litigation.

B. This Court Should be Guided by the Civil Rights Act of 1991 when confronted with a Challenged Employment Decision that was Motivated by both Lawful and Discriminatory Reasons, under the NLRA.

The purpose of the Civil Rights Act of 1991 was to provide remedies for intentional discrimination and unlawful harassment in the workplace, to confirm statutory authority and provide guidelines for lawsuits or workplace related disciplinary issues. Because these additions and changes to the Civil Rights Act of 1964 are substantial and dramatic in their nature and reach, it is apparent that Congress intended to provide additional guidelines for courts that are confronted with employment related mixed motive decisions. Because these established guidelines were not followed by either the ALJ or the NLRB as applied to Williamson and his post-suspension misconduct, this Court should reverse their determination and conform the remedial orders below to the stated congressional guidelines.

C. The Guidelines as Set Forth in the Civil Rights Act of 1991 Should Have Been Applied to Williamson's Post-Suspension Misconduct as a Means in Limiting the Available Remedies.

Once an employer establishes that he/she would have made the same employment decision even in the absence of discriminatory motivations, this showing will not negate the existent violation of law, but imposes a limitation on the available remedies. Title VII §706(g)(2)(B), 42 U.S.C. §2000e-5(g)(2)(B), as amended by CRA of 1991, Sec. 107(b). The court, is then able to have the employer prospectively adjust policy and to avoid engaging in future violations without placing the employee in a better position that he/she would have been in the absence of the "unlawful" component of the employer.

Where an ostensible mixed motive employment decision has been found to be tainted, the employer cannot be required to hire, reinstate or promote the plaintiff or to reimburse the plaintiff for any back pay or damages if the employer can establish that it would have taken the same employment action even in the absence of any discrimination.

Rehiring, job reinstatement, promotion, back pay, and damages are unavailable remedies upon a showing that the same action would have been taken in the absence of any discrimination, only limited relief should be available against the respondent. It would be within the Board's discretion to award appropriate declaratory and injunctive relief (other than promotion, job reinstatement, or admission to or reinstatement of union membership).

In light of his post-suspension misconduct, Williamson

would have been suspended and/or his resignation accepted absent his alleged protected union activity and he would also have been disqualified for purposes of reinstatement and back pay. Assuming that a prima facie case exists in support of the contention that the protected conduct of Williamson was a factor in the C & D's decision to indefinitely suspend Williamson or can be established by General Counsel; Williamson's suspension would still have been imposed and his resignation accepted based upon his misconduct. Williamson violated company rules and acted with such gross insubordination that the result would have been the same.

C & D had a long-standing company policy regarding, inter alia, the usage of profanity at the workplace, verbal or physical threats directed towards other employees, damage to company property and insubordination. The company rules clearly indicated that a statement to the effect that committing any of the aforementioned violations would be sufficient grounds for disciplinary action ranging from reprimand to immediate discharge, pending on the severity and/or frequency of the violation.

The Petitioner's rules were clearly and blatantly violated by Williamson through his actions on the day for which he tendered his resignation. While Williamson was in the personnel department (a public area) speaking with Mr. Frojian and Mr. Lane in regards to his suspension, Williamson violated the company rules when he shouted, "You may as well fire me now because I quit." Williamson immediately began to shout expletives at Mr. Lane and Mr. Fronjian saying "Fuck you and this fucking place." Williamson's voice was so loud that it was heard by other individuals in the executive suite/public area of the plant's personnel office. Williamson acknowledged that even though he knew of the location of the Petitioner's posted company rules and that he had reviewed them, he had never "heard people shout" obscenities in the reception area of the plant as he had done.

Other employees also testified as to the use of profanity in the workplace and the rules prohibiting its usage. Mr. Oliver, a pro-union employee and a Board witness, also active in the Union campaign and still employed, testified that he recognized the culture and customs of the plant and further acknowledged that anyone "should be suspended" for shouting obscenities in the general reception area of the plant. Another Board witness employee, Morgan also testified that he never heard of someone shouting obscenities in the reception area. As a matter of fact, the only testimony that "shop talk" was used at the plant referred to profanity used in the assembly and manufacturing areas of the plant. There was no testimony that profanity was used in the reception area or offices where Williamson made his remarks.

Through his actions, Williamson further violated the Company's rules when he threatened to kill supervisors including Mr. Tice, an ex-production supervisor. Mr. Tice testified that while he went to the locker room for the purpose of escorting Williamson out of the building and to acknowledge his resignation, Williamson "looked at me very straight in my eye and [said] 'You know, I'm going to fucking kill you. I'm going to fucking kill you. I'm going to kill the next person that walks through the door.'" After this exchange, Mr. Tice and a present custodian immediately quickly exited the locker room in fear of severe bodily harm and in order to avoid an inappropriate confrontation.

Mr. Williamson's insubordination at the employee information meeting also violated company policies. The record is replete with instances of Mr. Williamson' s continued insubordination, violence and use of profanity at the plant. Therefore, C & D had more than ample cause to discharge Williamson even assuming arguendo that union animus was a motivating factor in his alleged discharge.

The ALJ in his Order(see appendix A), subsequently

adopted by the NLRB in its August 25, 1995 Order (see appendix B), found that by issuing a verbal warning, suspending and discharging Williamson and by failing to reinstate him, for activities protected by the Act, C & D violated Section 8(a)(1) and (3) of the Act. The ALJ ordered that the C & D cease and desist from inter alia, disciplining, suspending and discharging employees for activities protected by Section 7 of the Act and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act. Further, the ALJ also ordered, as remedies, that C & D offer Williamson immediate and full reinstatement to his former position, or if such a position is no longer available, to a substantially equivalent one, without prejudice to his seniority. The ALJ also ordered Williamson to be made whole by C & D for any loss of earning, with interest, he may have suffered from the time of his suspension to the date of C & D offer of reinstatement.

When viewed in light of the CRA of 1991, the remedies awarded by the ALJ were not in compliance with the established guidelines as set forth by Congress. The CRA of 1991 provide that once a mixed motive decision has been found to be unlawful, the employer cannot be required to hire, reinstate, or promote the employee or to pay the employee back pay or damages, if the employer can establish that it would have taken the same employment action in the absence of any discrimination. Adjudicators have the discretion, inter alia, to grant relief other than promotion, job reinstatement, or admission or reinstatement to union membership.

The ALJ ordered that Williamson's reinstatement to his former position and back pay with interest. This order which was adopted by the NLRB is in contravention with the CRA's guidelines as pertaining to available remedies since C & D established the fact that it would have made the same decision to terminate Williamson in the absence of any

discrimination. As mentioned above, Williamson seriously violated the lawful company rules of C & D when inter alia, Williamson threatened the life of a C & D supervisor, smashed and damaged company property, violated every company policy with regard to insubordination, and flagrant abuse of the company policy regarding the use of profanity at the plant.

An employer has a right to maintain discipline in the workplace. J.P. Steven & Co., 219 NLRB 850 (1975)(Board decision upholding the employer's right to discharge employees who disrupted a meeting planned for the presentation of employer views on unionization.). While an employer may not discipline employees for actions protected under the Act, the employer need not accept insubordinate behavior not contemplated under the NLRA. As argued above, Mr. Williamson's comments were not protected under the Act. A fortiori, C & D did not commit an unfair labor practice in disciplining Mr. Williamson or accepting his resignation. Further, because the ALJ order awarding Williamson reinstatement, coupled with back pay and interest as a remedy for C & D violation of Section 8(a)(1) and (3) of the Act and this award of remedies was apposite of the guidelines as set forth in the CRA of 1991, is blatantly out of step with federal policy and requires correction by this Court.

CONCLUSION

For the reasons propounded in this petition, this Honorable Court should issue a Writ of Certiorari in this case.

Respectfully Submitted,

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